

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION**

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. 2:04-CR-97 PS
	)	
OSCAR HERRERA VALDEZ	)	

**OPINION AND ORDER**

Before the Court is Defendant Oscar Herrera Valdez's Motion to Suppress. He seeks to suppress the evidence obtained from a warrantless search conducted on October 20, 2004. Because the government had consent to search the area in question, the search was proper and the defendant's Motion must be denied.

**I. BACKGROUND**

On October 20, 2004, at approximately 4:30 p.m., Hammond Police Officer Keith Markert and East Chicago Detective Robert Aponte, both assigned to the Drug Enforcement Agency Task Force, approached a residence at 4606 Hickory in Hammond, Indiana. The agents were there following-up on information that they had received from an informant that an individual named "Oscar Valdez" had drugs stored at the property.

At the residence, the agents observed the defendant in the yard working on a lawn mower. They called to him over the gate and requested permission to enter the yard. The agents first attempted to speak to him in English, but it was immediately clear that he did not speak English. Task Force Agent (TFA) Aponte, who is fluent in Spanish, identified himself as law enforcement and again asked permission to enter the yard in Spanish. Although TFA Aponte is not a certified interpreter, he is Hispanic and his parents spoke Spanish in his home when he was

growing up. In addition, TFA Aponte tested out of college level Spanish. During the suppression hearing, TFA Aponte repeatedly demonstrated his proficiency in Spanish by speaking in Court in Spanish on several occasions which was then translated by the Court certified interpreter present during the hearing. There is no question that Aponte is fluent in Spanish and the Court found him to be completely credible as well.

At the scene, after the defendant allowed Aponte and Markert into his yard, TFA Aponte explained to the defendant that the agents wanted to come inside the residence to discuss some complaints that they had received. The defendant agreed and invited the agents into the residence. TFA Aponte continued to speak with the defendant in Spanish throughout the encounter and contemporaneously translated the defendant's statements for TFA Markert.

Inside the residence, TFA Aponte explained to the defendant that they wanted to search the home because they received information that there might be drugs inside. The defendant stated that he did not have any drugs. TFA Aponte showed the defendant a consent to search form written in Spanish. When the defendant indicated that he could not read Spanish, TFA Aponte read and explained the contents of the form to him. (Hrg. Tr. at 44). The defendant refused to sign the form. Nevertheless, he orally stated that the agents could search the home. Specifically, TFA Aponte testified that in response to his request that he sign the form, the defendant responded, "I'm not going to sign this. There is nothing here. If you want to search the house, you can do that because there is nothing here."<sup>1</sup> (Hearing Tr. at 28). TFA Aponte

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<sup>1</sup>TFA Aponte testified to the defendant's statements in both English and Spanish. As mentioned above, a certified interpreter, present to assist the defendant in the proceedings, translated TFA Aponte's Spanish testimony. Based on TFA Aponte's English testimony and the certified interpreter's translation of TFA Aponte's Spanish testimony it is clear that TFA Aponte consistently restated the defendant's words in both languages. Further, Agent Markert's

responded that it would be better if you signed the form. The defendant refused once again to sign the written consent form, but again orally stated “You can search my house.” The entire encounter, from the time the agents greeted the defendant from outside his yard to the time the defendant gave his oral consent to search the home, lasted just a few minutes.

The agents then proceeded to search the home while Valdez and TFA Aponte remained in the dining room. Agent Markert testified that it is agency policy to keep residents in the front of the home with supervision for their own safety during a search. During the course of the search, TFA Markert and the other agents located a door off a bedroom that was sealed with tape and blocked by a dresser and curtain. TFA Markert called TFA Aponte and the defendant back to the bedroom to ask the defendant questions about the door. Aponte asked the defendant whether he had access to the room behind the door. He responded that he did not. The agents then moved the dresser and opened the door to the room. There appears to be some dispute as to whether the door in question was open or whether a key was required to enter the door. However, TFA Markert testified that he was able to open the door without using significant force and that a key was not necessary. The defense presented no evidence to suggest that TFA Markert actually “broke down” the door.

Inside the storage room, which also had a door leading outside the residence, the agents discovered a large quantity of cocaine (between five and fifteen kilograms according to the indictment). Also inside the storage area the agents found a locked freezer. TFA Aponte asked the defendant if he had a key to the locked freezer. The defendant responded that he did not.

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testimony regarding TFA Aponte’s contemporaneous translation of the oral consent to search the home corroborated TFA Aponte’s testimony.

However, the agents found the key to the freezer in the storage room. Inside the freezer, the agents found a large quantity of marijuana.

The agents then placed the defendant under arrest and transported him to the Hammond Police Department.

## **II. DISCUSSION**

The defendant claims that he did not voluntarily consent to a search of the residence. He also claims that even if consent was given, its scope did not extend to the back storage room. Based on the credible testimony of TFAs Aponte and Markert, the Court concludes that the search of 4606 Hickory was made pursuant to voluntary oral consent and did not exceed the scope of that consent.

### **A. Voluntariness of Consent**

Ordinarily, the government cannot legally enter a private residence and conduct a search without a warrant. *United States v. Pedroza*, 269 F.3d 821, 820 (7th Cir. 2001). However, the government can conduct a search based upon an individual's voluntary consent without a warrant or probable cause, and any evidence discovered during the search may be seized and admitted at trial. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Bernitt*, No. 03-3065, 2004 WL 2891909 at \*4 (7th Cir. Dec. 15, 2004).

To determine whether consent was voluntary, courts must examine the totality of the circumstances. "Relevant factors include (1) the person's age, intelligence, and education, (2) whether he was advised of his constitutional rights, (3) how long he was detained before he gave his consent, (4) whether his consent was immediate, or was prompted by repeated requests by the authorities, (5) whether any physical coercion was used, and (6) whether the individual was in

police custody when he gave his consent.” *Schneckloth*, 412 U.S. at 227.

The first issue is whether the defendant understood TFA Aponte. Spanish is the defendant’s first language. Accordingly, TFA Aponte spoke Spanish to him. At the hearing, Aponte testified about his conversations with the defendant in both English and Spanish. Aponte’s Spanish testimony was translated for the Court by the defendant’s interpreter. Aponte spoke clearly and the interpreter had no difficulty understanding or translating Aponte’s Spanish testimony which consistently restated the defendant’s oral consent to search.

As for the factors that go into deciding whether the consent was voluntary, almost all of them militate in favor of the government. First, the defendant is middle-aged man who was able to understand and communicate with TFA Aponte throughout the encounter. There was no evidence presented to suggest that the defendant did not understand what was happening or was in any way incapacitated. Second, the defendant was presented a consent to search form, written in Spanish. When the defendant told TFA Aponte that he could not read, TFA Aponte explained the contents of the form to him. Third, the defendant was not detained prior to his consent. The defendant invited the agents into his yard and his home and sat unrestrained at the dining room table making small talk with TFA Aponte during the search. The initial encounter had lasted only several minutes, and TFA Aponte was friendly and non-threatening throughout. Fourth, the consent to search was obtained quickly. Although the defendant refused to sign the consent to search form, he gave his oral consent to search the home the first time he was asked. The defendant reiterated his oral consent to search when TFA Aponte again asked him to sign the consent form. Finally, TFA Aponte and the other agents were nonthreatening throughout the encounter. They did not use any physical force, did not display weapons, did not raise their

voices, and did not threaten Valdez.

The defendant makes much of his refusal to sign the consent to search form. However, he offers no legal authority to support his argument that written consent is required to establish that consent was given. Indeed, consent need not be in writing; consent can be given verbally. For example, in *Bernitt*, the Seventh Circuit recently held that a consent to search given verbally was voluntary even though defendant had been arrested, handcuffed in the back of a police car and not advised of his rights prior to giving consent. *Bernitt*, 2004 WL 2891909 at \*4. In some instances, consent can even be nonverbal. *United States v. Walls*, 225 F.3d 858, 863 (7th Cir. 2000).

Further, refusal to sign a consent form does not automatically mean that a suspect has not consented to that search. For example, in *United States v. Price*, 54 F.3d 342 (7th Cir. 1995), the Seventh Circuit held that the defendant gave oral consent even where he refused to sign a consent form. Specifically, during the course of a traffic stop, a police officer asked the defendant if he could search his car. The defendant responded “sure,” but refused to sign a consent form. *Id.* at 346. At the suppression hearing, the defense argued that the defendant’s refusal to sign the consent form was evidence of his confusion which, in turn, cast doubt on his original oral consent. *Id.* at 347. The District Court and the Seventh Circuit rejected this argument and found the initial oral consent to be voluntary. *Id.*; *see also United States v. Moore*, No. 88-C-432-1, 1988 WL 139293 at \*1 (N.D. Ill. Dec. 20, 1988) (“The fact that prior to [giving oral consent] Moore had refused to sign a written consent does not vitiate an otherwise valid consent”).

In this case, given that the defendant told Aponte that he was unable to read Spanish

(Hrg. Tr. at 44), it is not unreasonable for the defendant to refuse to commit his name to a form when his only knowledge is based on TFA Aponte's representations of its contents, but still orally consent to a search of the home.

It is also important to note that the defendant did not put on any evidence to rebut the credible testimony presented by the two agents that the defendant gave oral consent to search his home. In the absence of evidence to the contrary, and since the court found both agents to be credible, we accordingly find that the totality of the circumstances clearly demonstrates that the defendant voluntarily gave his oral consent to search the residence.

#### **B. Scope of the Search**

In the alternative, the defendant argues that even if he gave voluntary consent to search the residence, that consent does not extend to the back storage room. We disagree.

First, it is clear that the defendant had the authority to consent to the search of the storage room. It is well settled that a search is proper if conducted pursuant to voluntary consent either from "the individual whose property is to be searched, from a third party possessing common authority or joint control over the premises, or from an individual with apparent authority to consent to the search." *United States v. Saadeh*, 61 F.3d 510, 517 (7th Cir. 1995). Whether an individual has apparent authority is determined from the perspective of the police. *Id.* Thus, apparent authority exists if the police, at the time of the search, found sufficient indicia of actual authority to reasonably believe that the person had common authority over the premises. *Id.*

In this case, the defendant had apparent authority to consent to the search of the back

storage room and the freezer.<sup>2</sup> The defendant was a resident of the home. He told the agents “you can search my house” and made no statements to indicate that he did not have access to the entire house. The storage room was clearly part of the residence as its door was in a back bedroom of the residence. Although that door was sealed with duct tape, it was not locked. The agents merely had to remove the duct tape to open the door. Further, the defendant apparently had access to the freezer in the storage room. The defendant did not have the key to the freezer on his person, but the agents found the key inside the storage room. Thus, it is reasonable for the officers to conclude that the defendant had access to both the storage room and the freezer.

In addition, the scope of the search, as explained to the defendant, clearly included any area where the officers might find narcotics. The scope of a consent search may not exceed the scope of the consent given. *United States v. Melgar*, 227 F.3d 1038, 1041-42 (7th Cir. 2000). Generally, the expressed object of a search defines the scope of consent, unless the suspect giving consent exercises their prerogative to expressly limit its scope. *Saadeh*, 61 F.3d at 518. “A lawful search of fixed premises generally extends to the entire areas in which the object of the search may be found and is not limited by the possibility that separate acts of entry or

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<sup>2</sup>Counsel for Valdez also argued that because Valdez did not have access to the back storage room and/or freezer, he could not consent to the search. Essentially, Valdez argues that he rented the premises, but that the back storage room was not part of the house that he rented. However, if this is true, then Valdez does not have a privacy interest in the back storage room. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (“A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.”). Without a privacy interest in the back storage room, Valdez does not have standing to challenge the search. *United States v. Salvucci*, 448 U.S. 83, 86-87 (1980) (defendant has standing to challenge admission of evidence only if his own constitutional rights have been violated). However, we need not resolve this issue because Valdez had apparent authority to consent to the search of the back storage room.

opening may be required to complete the search.” *Id.*; see also *United States v. Torres*, 32 F.3d 225, 231 (7th Cir. 1994) (“Permission to search a specific area for narcotics . . . may be construed as permission to search any compartment or container within the specified area where narcotics may be found.”)(citing *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir.1992)).

In this case, the defendant gave a general consent to search the residence, without any limitations. In addition, TFA Aponte expressly informed the defendant that the agents were looking for drugs. Both the back storage room and the freezer were clearly big enough to contain the drugs. At no time during the search did the defendant protest or attempt to stop the agents from going into the storage room or the freezer. Accordingly, the storage room and freezer were clearly within the scope of the consent that the defendant gave to search the home.

### **III. CONCLUSION**

For the foregoing reasons, Defendant’s Motion to Suppress is **DENIED**.

**SO ORDERED.**

ENTERED: January 27, 2005

s/ Philip P. Simon  
PHILIP P. SIMON, JUDGE  
UNITED STATES DISTRICT COURT